



[6741-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 346 and 390

RIN 3064-AE09

Transferred OTS Regulations and FDIC Regulations Regarding Disclosure and Reporting of CRA-Related Agreements

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (“FDIC”) is adopting a final rule (“Final Rule”) to rescind and remove certain regulations transferred to the FDIC from the Office of Thrift Supervision (“OTS”) on July 21, 2011, in connection with the implementation of applicable provisions of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The Dodd-Frank Act provided that the former OTS rules that were transferred to the FDIC would be enforceable by or against the FDIC until they were modified, terminated, set aside, or superseded in accordance with applicable law by the FDIC, by any court of competent jurisdiction, or by operation of law. The requirements for State savings associations are substantively similar to existing FDIC regulations.

DATES: The Final Rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

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SUPPLEMENTARY INFORMATION:

I. Background

A. The Dodd-Frank Act

The Dodd-Frank Act¹ provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act, codified at 12 U.S.C. 5411, the powers, duties, and functions formerly performed by the OTS were divided among the FDIC, as to State savings associations, the Office of the Comptroller of the Currency (“OCC”), as to Federal savings associations, and the Board of Governors of the Federal Reserve System (“FRB”), as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(b), provides the manner of treatment for all orders, resolutions, determinations, regulations, and advisory materials that had been issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such materials were in effect on the day before the transfer date, they continue to be in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act, codified at 12 U.S.C. 5414(c), further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

regulations that would be enforced by the FDIC and the OCC, respectively. On June 14, 2011, the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act." This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.²

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act, codified at 12 U.S.C. 5412(b)(2)(B)(i)(II), granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC's existing authority to issue regulations under the Federal Deposit Insurance Act ("FDI Act") and other laws as the "appropriate Federal banking agency" or under similar statutory terminology. Section 312(c) of the Dodd-Frank Act amended the definition of "appropriate Federal banking agency" contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q), to add State savings associations to the list of entities for which the FDIC is designated as the "appropriate Federal banking agency." As a result, when the FDIC acts as the designated "appropriate Federal banking agency" (or under similar terminology) for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations, as well as for State nonmember banks and insured branches of foreign banks.

As noted, on June 14, 2011, pursuant to this authority, the FDIC's Board of Directors reissued and redesignated certain transferring regulations of the former OTS. These transferred OTS regulations were published as new FDIC regulations in the Federal Register on August 5, 2011.³ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later

² 76 FR 39247 (July 6, 2011).

³ 76 FR 47652 (Aug. 5, 2011).

recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

One of the OTS rules transferred to the FDIC governs OTS oversight of disclosure and reporting of CRA-related agreements in the context of State savings associations. The OTS rule, formerly found at 12 CFR part 533, was transferred to the FDIC with only minor nonsubstantive changes and is now found in the FDIC's rules at part 390, subpart H, entitled "Disclosure and Reporting of CRA-Related Agreements." Before the transfer of the OTS rules and continuing today, the FDIC's rules contained part 346, also entitled "Disclosure and Reporting of CRA-Related Agreements," a rule governing FDIC oversight of disclosure and reporting of CRA-related agreements with respect to IDIs for which the FDIC has been designated the appropriate Federal banking agency. After careful review and comparison of part 390, subpart H and part 346, the FDIC proposes to rescind part 390, subpart H, because, as discussed below, it is substantively redundant to existing part 346 and simultaneously we propose to make technical conforming edits to our existing rule.

II. Proposed Rule

A. Removal of Part 390, Subpart H (Former OTS 12 CFR Part 533)

The FDIC issued a Notice of Proposed Rulemaking ("NPR" or "Proposed Rule"), which was published in the Federal Register on December 19, 2013, regarding the removal of part 390, subpart H, which governs disclosure and reporting of all CRA-related agreements for State savings associations.⁴ The former OTS rule was transferred to the FDIC with only nominal changes. The NPR proposed removing part 390, subpart H from the CFR in an effort to streamline FDIC regulations for all FDIC-supervised institutions. As discussed in the Proposed Rule, the FDIC carefully reviewed the transferred rule, part 390, subpart H, and compared it with

⁴ 78 FR 76768 (Dec. 19, 2013).

part 346, an FDIC regulation that existed before the transfer of part 390, subpart H and that continues to remain in effect today. Like the transferred rule, part 346 governs disclosure and reporting of all CRA-related agreements for State nonmember insured banks and their subsidiaries. Although the two rules were substantively the same, minor technical and conforming amendments were proposed.⁵

B. Amendments to Part 346

The Proposed Rule proposed to modify the scope of part 346 to include State savings associations and their subsidiaries to conform to and reflect the scope of the FDIC's current supervisory responsibilities as the appropriate Federal banking agency. The Proposed Rule also proposed to add a new subsection (m), which would define "State savings association" as having "the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))." In finalizing these proposals, oversight of disclosure and reporting of CRA-related agreements in part 346 would apply to all FDIC-supervised institutions, including State savings associations, and part 390, subpart H would be removed because it is largely redundant of those rules found in part 346. Rescinding part 390, subpart H will serve to streamline the FDIC's rules and eliminate unnecessary regulations.

III. Comments

The FDIC issued the NPR with a 60-day comment period, which closed on February 18, 2014. The FDIC received no comments on its Proposed Rule, and consequently the Final Rule is adopted as proposed without any changes.

IV. Explanation of the Final Rule

⁵ 78 FR 76770.

As discussed in the NPR, Part 390, Subpart H is substantively similar to Part 346, and the designation of Part 346 as a single authority of disclosure and reporting of CRA-related agreements for all FDIC-supervised institutions will serve to streamline the FDIC's rules and eliminate unnecessary regulations. To that effect, the Final Rule removes and rescinds 12 CFR Part 390, Subpart H in its entirety.

Consistent with the Proposed Rule, the Final Rule also amends section 346.1 to modify the scope of Part 346 to include State savings associations and their subsidiaries to conform to and reflect the scope of the FDIC's current supervisory responsibilities as the appropriate Federal banking agency. The Final Rule also adds a new subsection (m), which would define "State savings association" as having "the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))." The current definition occupying subsection (m) ("Term of Agreement"), will be moved to a newly created subsection (n) within section 346.11.

V. Administrative Law Matters

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act ("PRA") of 1995, 44 U.S.C. 3501-3521, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The information collections contained in Part 346 are cleared by OMB under the FDIC's "CRA Sunshine" information collection (OMB No. 3064-0139). The FDIC's burden estimates were updated in connection with the collection's 2012 renewal to include State savings associations transferred from the OTS to the FDIC. The FDIC reviewed its burden estimates for the collection at the time it assumed responsibility for supervision of State savings associations transferred from the OTS and determined that no

changes to the burden estimates were necessary. This Final Rule does not modify the FDIC's existing collection and does not involve any new collections of information pursuant to the PRA.

The Final Rule rescinds and removes from FDIC regulations Part 390, Subpart H. This rule was transferred with only nominal changes to the FDIC from the OTS when the OTS was abolished by Title III of the Dodd-Frank Act. Part 390, Subpart H is largely redundant of the FDIC's existing Part 346 regarding disclosure and reporting of CRA-related agreements. The Final Rule amends sections 346.1 and 346.11 to include State savings associations and their subsidiaries within the scope of Part 346 and to define "State savings association," respectively. These measures clarify that State savings associations, as well as State nonmember banks are subject to Part 346. Since these State savings associations were already covered by the OTS rule, these provisions of the Final Rule will not involve any new collections of information under the PRA or impact current burden estimates. Based on the foregoing, no information collection request has been submitted to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, generally requires an agency to consider whether a final rule will have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to \$500 million).⁶ Pursuant to section 605(b) of the RFA, a final regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory statement in the Federal Register together with the rule. For the reasons provided below, the

⁶ 5 U.S.C. 601 *et seq.*

FDIC certifies that the Final Rule does not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As discussed in the notice of proposed rulemaking, Part 390, Subpart H was transferred from OTS Part 533, which governed disclosure and reporting of CRA-related agreements. OTS Part 533 had been in effect since 2001, and all State savings associations were required to comply with it. Because it is redundant of existing Part 346 of the FDIC's rules, the FDIC proposes rescinding and removing Part 390, Subpart H. As a result, all FDIC-supervised institutions—including State savings associations and their subsidiaries—would be required to comply with Part 346 if they are in CRA-related agreements. Because all State savings associations and their subsidiaries have been required to comply with substantially similar disclosure and reporting rules if they engaged in CRA-related agreements since 2001, today's Final Rule has no significant economic impact on any State savings association.

C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the Final Rule is not a “major rule” within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), 5 U.S.C. 801 *et seq.*

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. In the NPR, the FDIC invited comments on whether the Proposed Rule was clearly stated and effectively organized, and how the FDIC might make it easier to understand. Although the FDIC did not receive any comments, the FDIC sought to present the Final Rule in a simple and straightforward manner.

E. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured depository institutions.⁷ The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and is commencing the next decennial review, which is expected to be completed by 2016. The NPR solicited comments on whether the proposed rescission of Part 390, Subpart H and amendments to Part 346 would impose any outdated or unnecessary regulatory requirements on insured depository institutions. No comments on this issue were received. Upon review, the FDIC does not believe that Part 346, as amended by the Final Rule, imposes any outdated or unnecessary regulatory requirements on any insured depository institutions.

List of Subjects

12 CFR Part 346

Banks and banking, Disclosure and reporting of CRA-related agreements, Savings associations

12 CFR Part 390

Disclosure and reporting of CRA-related agreements

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation amends 12 CFR parts 346 and 390 as set forth below:

1. Revise part 346 to read as follows:

⁷ Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

PART 346—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

Sec.

346.1 Purpose and scope of this part.

346.11 Other definitions and rules of construction used in this part.

Authority 12 U.S.C. 1831y

PART 346—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

§ 346.1 Purpose and scope of this part.

(a) *General.* This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person, insured depository institution, or affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) *Scope of this part.* The provisions of this part apply to—

(1) State nonmember insured banks;

(2) Subsidiaries of state nonmember insured banks;

(3) Nongovernmental entities or persons that enter into covered agreements with any company listed in paragraphs (b)(1), (2), (4) and (5) of this section.

(4) State savings associations; and

(5) Subsidiaries of State savings associations.

(c) *Relation to Community Reinvestment Act.* This part does not affect in any way the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) or the FDIC's Community Reinvestment regulation found at 12 CFR part 345, or the FDIC's interpretations or administration of that Act or regulation.

(d) *Examples.* (1) The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

(2) Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issues that may arise in this part.

§ 346.11 Other definitions and rules of construction used in this part.

(a) *Affiliate.* “Affiliate” means—

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 346.2, an “affiliate” includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time—

(i) The parties enter into the agreement; and

(ii) The NGEF that is a party to the agreement makes a CRA communication, as described in § 346.3.

(b) *Control*. “Control” is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate*. A “CRA affiliate” of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination prior to the agreement. An insured depository institution or affiliate also may designate any company as a CRA affiliate at any time prior to the time a covered agreement is entered into by informing the NGEF that is a party to the agreement of such designation.

(d) *CRA public file*. “CRA public file” means the public file maintained by an insured depository institution and described in 12 CFR 345.43.

(e) *Executive officer*. The term “executive officer” has the same meaning as in § 215.2(e)(1) of the Board of Governors of the Federal Reserve System's Regulation O (12 CFR 215.2(e)(1)).

(f) *Federal banking agency; appropriate Federal banking agency*. The terms “Federal banking agency” and “appropriate Federal banking agency” have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(g) *Fiscal year*. (1) The fiscal year for a NGEF that does not have a fiscal year shall be the calendar year.

(2) Any NGEP, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(h) *Insured depository institution*. “Insured depository institution” has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(i) *NGEP*. “NGEP” means a nongovernmental entity or person.

(j) *Nongovernmental entity or person* —(1) *General*. A “nongovernmental entity or person” is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions*. A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A federally-chartered public corporation that receives Federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (j)(2)(i) through (iii) of this section.

(k) *Party*. The term “party”. The authority citation for part 405 continues to read as follows: with respect to a covered agreement means each NGEF and each insured depository institution or affiliate that entered into the agreement.

(l) *Relevant supervisory agency*. The “relevant supervisory agency” for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

(m) *State savings association*. “State savings association” has the same meaning as in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3)).

(n) *Term of agreement*. An agreement that does not have a fixed termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the relevant supervisory agency for the agreement otherwise notifies each party in writing.

**PART 390 -- REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT
SUPERVISION**

Subpart H ---Disclosure and Reporting of CRA-Related Agreements

2. The authority citation for part 390 continues to read as follows:

Authority: 12 U.S.C. 1831y.

Subpart H – [Removed and Reserved]

3. Remove and reserve subpart H consisting of §§ 390.160 through 390.170.

Dated at Washington, D.C., this 15th day of July, 2014.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman

Executive Secretary

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